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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 02 2010
SRC-07-800-19488

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [redacted]. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750 Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL), accompanied the petition. The Form ETA 750 was accepted on July 13, 2004 and certified on December 21, 2006 initially on behalf of the original beneficiary.[1] The instant petition was filed on July 10, 2007 for a substituted beneficiary.[2] Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent degree.

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[1] The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

[2] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the Department of Labor (DOL) at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28 -96a.pdf (March 7, 1996).

On appeal, counsel asserts that the petitioner established the beneficiary's educational qualifications with the evaluation stating that the beneficiary attained the equivalent of U.S. Bachelor of Science degree based the beneficiary's three year bachelor's degree and one year master of science degree both from the University of Rajshahi in Bangladesh.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

The record contains the beneficiary's bachelor of science degree and transcripts for the three years of study, and master of science degree and transcripts for one year of study from the [redacted]. Thus, the issues are whether each degree is, on its own, a single source foreign equivalent to a U.S. master's degree, if not, whether each of them is on its own a single source foreign equivalent to a U.S. baccalaureate degree plus five years of experience. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah,* 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah,* 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. In the instant case, the three-year bachelor of science degree from the University of Rajshahi in Bangladesh is not the foreign equivalent degree to a U.S. baccalaureate degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

While EDGE confirms that a three-year bachelor of science degree (Honors) from [redacted] is awarded upon completion of three years of university or college programs following higher secondary education and represents attainment of a level of education comparable to three years of university study in the United States, it does not suggest that a three-year degree from [redacted]

may be deemed a foreign equivalent degree to a U.S. baccalaureate. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). Here the beneficiary's three-year bachelor of science degree from the University of Rajshahi does not represent attainment of a level of education comparable to a bachelor's degree in the United States.

EDGE also confirms that a master of science awarded upon completion of one year of tertiary education following the three-year bachelor of science degree in Bangladesh is not the foreign equivalent degree to a U.S. master's degree, it, however, represents attainment of a level of education comparable to a bachelor's degree in the United States. Here the beneficiary's master of science degree [redacted] is a single source foreign degree equivalent to a U.S. bachelor of science degree.

Therefore, the beneficiary has a "United States baccalaureate degree or a foreign equivalent degree," and thus, meet the minimum level of education required for the equivalent of an advanced degree, namely a Bachelor's degree, for preference visa classification under section 203(b)(2) of the Act. However, to qualify for the second preference classification, the beneficiary must establish that she possessed at least five years of progressive experience in the specialty after her bachelor's equivalent degree but prior to the priority date and also meets all requirements set forth on the certified labor certification.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications are found on Form ETA 750A, Item 14 which requires a bachelor's degree in engineering, computer science, mathematics or management of information systems. Item 14 also requires five years of experience in the job offered or in the related occupation of programmer analyst, senior engineer or systems analyst in addition to the degree. Further, the petitioner indicates that it will accept a master degree plus two years of experience in the job offered or as a programmer analyst, senior engineer or systems analyst in lieu of a bachelor's degree plus five years of experience.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The beneficiary's transcript for her one year master's degree program at the University of Rajshahi shows that the beneficiary [redacted] in the Faculty of Life and Earth Science at that university. Accordingly, the beneficiary does not possess a U.S. bachelor's degree or a foreign equivalent degree in the field required by the labor certification and does not meet the requirements of the labor certification, and thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified additional grounds of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). In the instant case, the petition filed the Form ETA 750 on July 13, 2004 with DOL seeking to employ the beneficiary permanently as a software engineer at [redacted]. However, on July 10, 2007, the petitioner filed the instant petition intending to employ the substituted beneficiary in the same proffered position at a different location, that is [redacted]. Therefore, the petitioner intends to employ the beneficiary as a software engineer at a location outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

In addition, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on July 13, 2004. The proffered wage as stated on the Form ETA 750 is $80,330 per year. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), USCIS will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claimed to have worked for the petitioner since December 2004 and the petitioner submitted the beneficiary's W-2 forms for 2005 through 2007 and paystub for January 2008. The W-2 forms show that the petitioner paid the beneficiary $25,000.02 in 2005, $37,500.03 in 2006 and $37,500.03 in 2007. The paystub for January 2008 shows that the petitioner paid the beneficiary salary of $4,166.67 per month. If the petitioner had continued to pay the beneficiary at the same rate to the end of the year, the petitioner would have paid the beneficiary $50,000.04 in 2008. The petitioner failed to demonstrate that it paid a full proffered wage to the beneficiary in 2004 through 2008. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the full proffered wage of $80,330 in 2004, and the difference of $55,329.98 in 2005, $42,829.97 in 2006, $42,829.97 in 2007 and $30,329.97 in 2008 between wages actually paid to the beneficiary and the proffered wage respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

> years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The record contains the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation Income Tax Return, for 2004 through 2006. The tax returns show that the petitioner is structured as an S corporation and its fiscal year is based on the calendar year. The petitioner's tax returns show its net income or net current assets in 2004 through 2006 as follows:

- In 2004, the Form 1120S stated net income[5] of $82,717 and net current assets of $188,663.
- In 2005, the Form 1120S stated net income of $45,343 and net current assets of $232,888.
- In 2006, the Form 1120S stated net income of $83,665 and net current assets of $384,330.

For the year 2004, the tax return appears that the petitioner had sufficient net income or net current assets to pay the beneficiary the full proffered wage of $80,330 that year; for the year 2005, the petitioner appeared to have sufficient net current assets to pay the beneficiary the difference of $55,329.98 between wages actually paid to the beneficiary and the proffered wage; and for 2006, the petitioner appeared to have sufficient net income or net current assets to pay the beneficiary the difference of $42,829.97 between wages actually paid to the beneficiary and the proffered wage. However, the record does not contain regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements, for 2007 and 2008, and therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the difference of $42,829.97 in 2007 and $30,329.97 in 2008 respectively between wages actually paid to the beneficiary and the proffered wage.

Moreover, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions, including I-129 nonimmigrant petitions.

USCIS records show that the petitioner filed seven I-140 immigrant petitions (including the instant petition) and 48 I-129 nonimmigrant petitions. The six of I-140 immigrant petitions were approved

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[5] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

by USCIS for which the petitioner is obligated to pay three proffered wages in 2004 and 2005, and six in 2006 and 2007[6] as well as H-1B employees in addition to the instant beneficiary.

The record does not contain any evidence showing that the petitioner paid all three proffered wages the petitioner was responsible to pay in 2004. As previously discussed, the petitioner had net income of $82,717 and net current assets of $188,663. The petitioner's net income was just sufficient to pay one proffered wage[7] and the net current assets were sufficient to pay two proffered wages. Therefore, the petitioner failed to establish that it had ability to pay all three proffered wages to the approved beneficiaries in 2004 and further failed to establish ability to pay the instant beneficiary the proffered wage of $80,330 in the year of the priority date with balances after deducting the three proffered wages for those approved beneficiaries from the net income or net current assets.

The record does not contain any evidence showing that the petitioner paid all three proffered wages the petitioner was responsible to pay in 2005. As previously discussed, the petitioner had net income of $45,343 and net current assets of $232,888. The petitioner's net income was insufficient to pay a single proffered wage in 2005, and the net current assets were sufficient to pay two proffered wages. Therefore, the petitioner failed to establish that it had ability to pay all three proffered wages to the approved beneficiaries in 2005 and further failed to establish ability to pay the instant beneficiary the difference of $55,329.98 between wages actually paid to the instant beneficiary and the proffered wage that year with balances after deducting the three proffered wages for those approved beneficiaries from the net income or net current assets.

In response to the director's request for evidence and on appeal, counsel submitted the petitioner's Form 941 Quarterly Tax Reports for 2006 and 2007. The For 941 for 2006 shows that the petitioner paid the five beneficiaries of the approved petitions partial proffered wages of $186,795. The petitioner must

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[6] USCIS records show that the six approved immigrant petitions are as follows:
-- SRC-07-800-12133 filed on May 1, 2007 with the priority date of July 13, 2004, and approved on August 23, 2007.
-- SRC-07-800-12127 filed on May 1, 2007 with the priority date of July 2, 2004, and approved on May 14, 2007.
-- SRC-07-800-12117 filed on May 1, 2007 with the priority date of October 26, 2004, and approved on October 25, 2007.
-- SRC-07-100-51228 filed on February 9, 2007 with the priority date of September 19, 2006, and approved on February 21, 2007.
-- SRC-07-060-52670 filed on December 28, 2006 with the priority date of November 2, 2006, and approved on January 4, 2007.
-- SRC-07-057-51873 filed on December 22, 2006 with the priority date of October 3, 2006, and approved on January 3, 2007.

[7] Assuming the petitioner offered all other beneficiaries the proffered wage at the same rate as the one for the instant beneficiary.

demonstrate that it had sufficient net income or net current assets to pay the difference of $295,185 between wages actually paid to these beneficiaries of the approved petitions and their proffered wages and the difference of $42,829.97 between wages actually paid to the instant beneficiary and her proffered wage. As previously discussed, the petitioner had net income of $83,665 and net current assets of $384,330 in 2006. While the petitioner's net income was not sufficient to pay these differences of total $338,014.97, its net current assets were sufficient to pay them and thus, the petitioner established its ability to pay all the six proffered wages in 2006 through the examination of wages already paid and net income or net current assets.

The Form 941 for 2007 shows that the petitioner paid the six beneficiaries of the approved petitions partial proffered wages of $340,589.07. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of $141,390.93 between wages actually paid to these six beneficiaries of the approved petitions and their proffered wages before establish the ability to pay the proffered wage to the instant beneficiary. However, as previously mentioned, the record does not contain regulatory-prescribed evidence for 2007 and therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the six beneficiaries of the approved petitions the difference of $141,390.93 between wages actually paid to these six beneficiaries of the approved petitions and their proffered wages and to further pay the instant beneficiary the difference of $42,829.97 between wages actually paid to the instant beneficiary and the proffered wage that year.

The record does not contain documentary evidence to establish the petitioner's ability to pay the proffered wages for 2008 onward. Without regulatory-prescribed evidence to demonstrate that the petitioner paid the full proffered wages to the approved beneficiaries and the instant beneficiary or that the petitioner had sufficient net income or net current assets to pay all these proffered wages, the AAO cannot determine that the petitioner has established continuing ability to pay all proffered wages including the proffered wage for the instant beneficiary as of the priority date and continue to the present.

Therefore, the petition cannot be approved. Accordingly, the director's March 4, 2008 decision is affirmed.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL except for 2006, the petitioner failed to submit documentary evidence to establish the ability to pay the beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.